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**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**50 CFR Part 222**

**[Docket No. 170601529-8177-0]**

**RIN 0648-BG90**

**2018 Annual Determination to Implement the Sea Turtle Observer Requirement**

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Final rule.

**SUMMARY:** The National Marine Fisheries Service (NMFS) publishes its final Annual Determination (AD) for 2018, pursuant to its authority under the Endangered Species Act (ESA). Through the AD, NMFS identifies U.S. fisheries operating in the Atlantic Ocean, Gulf of Mexico, and Pacific Ocean that will be required to take fisheries observers upon NMFS' request. The purpose of observing identified fisheries is to learn more about sea turtle interactions in a given fishery, evaluate measures to prevent or reduce sea turtle takes and to implement the prohibition against sea turtle takes. Fisheries identified on the 2018 AD (see Table 1) will be eligible to carry observers as of the effective date of this rulemaking, and will remain on the AD for a five-year period until December 31, 2022.

**DATES:** Effective June 9, 2018.

**ADDRESSES:** See SUPPLEMENTARY INFORMATION for a listing of all Regional Offices.

**FOR FURTHER INFORMATION CONTACT:** Sara Wissmann, Office of Protected Resources, (301) 427-8402; Ellen Keane, Greater Atlantic Region, (978 )282-8476; Dennis Klemm, Southeast Region, (727) 824-5312; Dan Lawson, West Coast Region, (206) 526-4740; Irene Kelly, Pacific Islands Region, (808) 725-5141. Individuals who use a telecommunications device for the hearing impaired may call the Federal Information Relay Service at 1 (800) 877-8339 between 8 a.m. and 4 p.m. Eastern time, Monday through Friday, excluding Federal holidays.

**SUPPLEMENTARY INFORMATION:**

*Availability of Published Materials*

Information regarding the Marine Mammal Protection Act (MMPA) List of Fisheries (LOF) may be obtained at <http://www.nmfs.noaa.gov/pr/interactions/fisheries/lof.html> or from any NMFS Regional Office at the addresses listed below:

- NMFS, Greater Atlantic Region, Protected Resources Division, 55 Great Republic Drive, Gloucester, MA 01930;
- NMFS, Southeast Region, Protected Resources Division, 263 13<sup>th</sup> Avenue South, St. Petersburg, FL 33701;
- NMFS, West Coast Region, Protected Resources Division, 501 W. Ocean Blvd., Suite 4200, Long Beach, CA 90802;
- NMFS, Pacific Islands Region, Protected Resources Division, 1845 Wasp Blvd., Building 176. Honolulu, HI 96818.

**Purpose of the Sea Turtle Observer Requirement**

Under the ESA, 16 U.S.C. 1531 *et seq.*, NMFS has the responsibility to implement

programs to conserve marine life listed as endangered or threatened. All sea turtles found in U.S. waters are listed as either endangered or threatened under the ESA. Kemp's ridley (*Lepidochelys kempii*), loggerhead (*Caretta caretta*; North Pacific distinct population segment), leatherback (*Dermochelys coriacea*), and hawksbill (*Eretmochelys imbricata*) sea turtles are listed as endangered. Loggerhead (*Caretta caretta*; Northwest Atlantic distinct population segment), green (*Chelonia mydas*; North Atlantic, South Atlantic, and East Pacific distinct population segments), and olive ridley (*Lepidochelys olivacea*) sea turtles are listed as threatened, except for breeding colony populations of olive ridleys on the Pacific coast of Mexico, which are listed as endangered. Due to the inability to distinguish between populations of olive ridley turtles away from the nesting beach, NMFS considers these turtles endangered wherever they occur in U.S. waters. While some sea turtle populations have shown signs of recovery, many populations continue to decline.

Incidental take, or bycatch, in fishing gear is the primary anthropogenic source of sea turtle injury and mortality in U.S. waters. Section 9 of the ESA prohibits the take (defined to include harassing, harming, pursuing, hunting, shooting, wounding, killing, trapping, capturing, or collecting or attempting to engage in any such conduct), including incidental take, of endangered sea turtles. Pursuant to section 4(d) of the ESA, NMFS has issued regulations extending the prohibition of take, with exceptions, to threatened sea turtles (50 CFR 223.205 and 223.206). Section 11 of the ESA provides for civil and criminal penalties for anyone who violates the Act or a regulation issued to implement the Act. NMFS may grant exceptions to the take prohibitions with an incidental take statement or an incidental take permit issued pursuant to ESA section 7 or 10, respectively. To do so, NMFS must determine that the activity that will

result in incidental take is not likely to jeopardize the continued existence of the affected listed species. For some Federal fisheries and most state fisheries, NMFS has not granted an exception for incidental takes of sea turtles primarily because we lack information about fishery-sea turtle interactions.

The most effective way for NMFS to learn more about sea turtle-fishery interactions in order to implement the take prohibitions and prevent or minimize take is to place observers aboard fishing vessels. In 2007, NMFS issued a regulation (50 CFR 222.402) establishing procedures to annually identify, pursuant to specified criteria and after notice and opportunity for comment, those fisheries in which the agency intends to place observers (72 FR 43176; August 3, 2007). These regulations specify that NMFS may place observers on U.S. fishing vessels, commercial or recreational, operating in U.S. territorial waters, the U.S. exclusive economic zone (EEZ), or on the high seas, or on vessels that are otherwise subject to the jurisdiction of the United States. Failure to comply with the requirements under this rule may result in enforcement action.

NMFS will pay the direct costs for vessels to carry observers. These include observer salary and insurance costs. NMFS may also evaluate other potential direct costs, should they arise. Once selected, a fishery will be required to carry observers, if requested, for a period of five years without further action by NMFS. This will enable NMFS to develop an appropriate sampling protocol to investigate whether, how, when, where, and under what conditions incidental takes are occurring; to evaluate whether existing measures are minimizing or preventing takes; and to implement ESA take prohibitions and conserve turtles.

### **Process for Developing an Annual Determination**

Pursuant to 50 CFR 222.402, NOAA's Assistant Administrator for Fisheries (AA), in consultation with Regional Administrators and Fisheries Science Center Directors, develops a proposed AD identifying which fisheries are required to carry observers, if requested, to monitor potential interactions with sea turtles. NMFS provides an opportunity for public comment on any proposed AD. The best available scientific, commercial, or other information regarding sea turtle-fishery interactions; sea turtle distribution; sea turtle strandings; fishing techniques, gears used, target species, seasons and areas fished; and/or qualitative data from logbooks or fisher reports informs the AD. Specifically, this AD is based on the extent to which:

- (1) The fishery operates in the same waters and at the same time as sea turtles are present;
- (2) The fishery operates at the same time or prior to elevated sea turtle strandings; or
- (3) The fishery uses a gear or technique that is known or likely to result in incidental take of sea turtles based on documented or reported takes in the same or similar fisheries; and
- (4) NMFS intends to monitor the fishery and anticipates that it will have the funds to do so.

For the 2018 AD, NMFS used the most recent version of the annually published Marine Mammal Protection Act (MMPA) List of Fisheries (LOF) as the comprehensive list of commercial fisheries for consideration. The LOF includes all known state and Federal commercial fisheries that occur in U.S. waters and on the high seas. In preparing an AD, however, we do not rely on the three-part MMPA LOF classification scheme. In addition, unlike the LOF, an AD may include recreational fisheries likely to interact with sea turtles based on the best available information.

NMFS consulted with appropriate state and Federal fisheries officials to identify which

fisheries, both commercial and recreational, to consider. NMFS carefully considered all recommendations and information available for developing the proposed AD. This is not an exhaustive or comprehensive list of all fisheries with documented or suspected takes of sea turtles. For other fisheries, NMFS may already be addressing incidental take through another mechanism (*e.g.*, rulemaking to implement modifications to fishing gear and/or practices), may be observing the fishery under a separate statutory authority, or will consider including them in future ADs based on the four previously noted criteria (50 CFR 222.402(a)). The fisheries not included on the 2018 AD may still be observed under a different authority (*e.g.*, MMPA, Magnuson-Stevens Fishery Conservation and Management Act (MSA)) than the ESA, if applicable.

Notice of the final AD will publish in the *Federal Register* and individuals permitted for each fishery identified will receive a written notification. NMFS will also notify state agencies. Once included in the final AD, a fishery will remain eligible for observer coverage for a period of five years to enable the design of an appropriate sampling program and to ensure collection of sufficient scientific data for analysis. If NMFS determines a need for more than five years to obtain sufficient scientific data, NMFS will include the fishery in the proposed AD again prior to the end of the fifth year.

The first AD was published in 2010 and identified 19 fisheries that were required to carry observers for a period of five years, through December 31, 2014, if requested by NMFS. On the 2015 AD, NMFS identified 14 fisheries, 11 were previously listed and 3 were newly listed. The 14 fisheries are currently required to carry observers for a period of five years, through December 31, 2019. The fisheries currently listed on the AD can be found at

<http://www.nmfs.noaa.gov/pr/species/turtles/observers.htm>.

### **Implementation of Observer Coverage in a Fishery Listed on the 2018 AD**

As part of the 2018 AD, NMFS has included, to the extent practicable, information on the fisheries and gear types to observe, geographic and seasonal scope of coverage, and any other relevant information. NMFS intends to monitor the fisheries and anticipates that it will have the funds to do so. After publication of a final determination, a 30-day delay in effective date for implementing observer coverage will follow, except for those fisheries where the AA has determined that there is good cause pursuant to the Administrative Procedure Act to make the rule effective without a 30-day delay. For the 2018 AD, the AA has not made this determination, therefore, this rule is effective 30 days after publication of this notice, see DATES.

The design of any observer program for fisheries identified through the AD process, including how observers will be allocated to individual vessels, will vary among fisheries, fishing sectors, gear types, and geographic regions and will ultimately be determined by the individual NMFS Regional Office, Science Center, and/or observer program. During the program design, NMFS will follow the standards below for distributing and placing observers among fisheries identified in the AD and among vessels in those fisheries:

- (1) The requirement to obtain the best available scientific information;
- (2) The requirement that observers be assigned fairly and equitably among fisheries and among vessels in a fishery;
- (3) The requirement that no individual person or vessel, or group of persons or vessels, be subject to inappropriate, excessive observer coverage; and
- (4) The need to minimize costs and avoid duplication, where practicable.

Vessels subject to observer coverage under the AD must comply with observer safety requirements specified in 50 CFR 600.725 and 600.746. Specifically, 50 CFR 600.746(c) requires vessels subject to observer coverage to provide adequate and safe conditions for carrying an observer and conditions that allow for operation of normal observer functions. To provide such conditions, a vessel must comply with the applicable regulations regarding observer accommodations (see 50 CFR parts 229, 300, 600, 622, 635, 648, 660, and 679) and possess a current United States Coast Guard (USCG) Commercial Fishing Vessel Safety Examination decal or a USCG certificate of examination. A vessel that fails to meet these requirements at the time an observer is to be deployed is prohibited from fishing (50 CFR 600.746(f)), unless NMFS determines that an alternative platform (*e.g.*, a second vessel) may be used or the vessel is not required to take an observer under 50 CFR 222.404. All fishers on a vessel must cooperate in the operation of observer functions. Observer programs designed or carried out in accordance with 50 CFR 222.404 are consistent with existing NOAA observer policies and applicable federal regulations, such as those under the Fair Labor and Standards Act (29 U.S.C. 201 *et seq.*), the Service Contract Act (41 U.S.C. 351 *et seq.*), and Observer Health and Safety regulations (50 CFR part 600).

Again, note that fisheries not included on the 2018 AD may still be observed under statutory authority other than the ESA (*e.g.*, MMPA, MSA). Additional information on observer programs in commercial fisheries is on the NMFS National Observer Program's website: <http://www.st.nmfs.noaa.gov/observer-home/>; links to individual regional observer programs are also on this website.

## **Sea Turtle Distribution**



The sea turtle distribution and ecological use of habitats that leads to the overlap of sea turtles and fisheries is critical information that NMFS uses to inform the development of the final AD. A summary of this information was included in the proposed AD (October 19, 2017, 82 FR 48674) and was considered in the development of the final 2018 AD.

### **Comments and Responses**

NMFS received seventeen comments on the proposed rule from members of the public, Oceana, Inc., Turtle Island Restoration Network, Omega Protein, Inc., Garden State Seafood Association, and the State of Maryland. Many commenters expressed general support of the rule or fishery observer programs, and others provided suggestions and requests for the inclusion or exclusion of particular fisheries. All substantive comments are specifically addressed below. Comments on issues outside the scope of the AD were noted, but are not responded to in this final rule.

### **General Comments**

*Comment 1:* Eleven commenters expressed general support for the rule.

*Response:* NMFS agrees and has included two fisheries on the 2018 AD to allow for increased data gathering on sea turtle bycatch in order to accomplish the purposes of the rule.

*Comment 2:* A commenter requested clarification on the purpose and role of including a fishery on the AD if the fishery is already eligible to carry observers under the MMPA or other authority. The commenter cites a comment on the 2015 AD where NMFS indicated that the Hawaii Deep-set longline fishery was already eligible to carry observers per the MMPA Category I classification; and, therefore, sufficient coverage would be provided and sea turtle interactions would be documented if they occurred.

*Response:* The purpose of this requirement is to implement ESA sections 9 and 4(d), which prohibit the incidental take of endangered and threatened sea turtles, respectively. In order to do so, we must learn more about sea turtle-fishery interactions in the identified fisheries to have information necessary to issue exemptions, if warranted, to the take prohibitions, consistent with ESA sections 4(d), 7 and 10.

The MMPA LOF fishery classifications do not directly influence the AD. Existing observer coverage, regardless of the mandate (*i.e.*, MMPA or MSA) is a consideration when we evaluate any fishery against the AD inclusion criteria. The overlap in seasonal and geographic distribution of sea turtles compared to the existing observation protocol for a given fishery, will help us to determine if the existing observer coverage is adequate to observe sea turtle interactions. It is possible that a Category I fishery is observed for marine mammals, but the existing observations are not sufficient to collect information on sea turtle interactions in a given season or geographic area. In this case inclusion of the fishery on the AD may be warranted to specifically expand coverage to times and areas when sea turtles may overlap with fishing effort. If the opposite is true, and coverage is sufficient for sea turtles, then NMFS may determine that inclusion on the AD is not warranted.

### **Comments on Gillnet Fisheries**

*Comment 3:* The Maryland Department of Natural Resources (MD DNR) expressed concern with including the mid-Atlantic gillnet fishery on the 2018 AD. This concern was based on several factors including that the Maryland coastal fishing fleet, which is part of the mid-Atlantic gillnet fishery, is small in scale and consists of some small gillnet vessels operating solely in state waters and state-managed fisheries. Small vessels would be unable to carry

additional safety gear, observer personnel and their equipment, and many vessels would not meet the safety requirements for observer coverage. Additionally, MD DNR commented that the Code of Federal Regulations, 50 CFR 222.404(b), indicates that small vessels can receive an exemption if the facilities are too small for performing observer duties or are inadequate. They requested clarification on the process and criteria for requesting an exemption and the criteria for determining whether a vessel is unsafe for an observer.

*Response:* After considering all comments and concerns, including those from MD DNR, NMFS has decided to include the mid-Atlantic gillnet fishery on the 2018 AD. NMFS recognizes that state-permitted vessels, particularly those operating in coastal or inshore areas, are often smaller, but that does not preclude the need to observe bycatch in those fisheries. Vessel size is a consideration when developing any observer sampling protocol. When developing an observer program, NMFS would consider the size of the vessels in the fleet to help determine the most appropriate approach for observing the fishery. NMFS observer programs have successfully observed small vessels that operate in inshore gillnet fisheries in the past, and would apply similar considerations to small state-permitted vessels that operate as part of the mid-Atlantic gillnet fishery. In many cases, small vessels have been able to accommodate the addition of an observer for day trips, as long as the vessel meets the USCG safety standards that are required. Alternatively, NMFS may be able to observe through alternative platforms, where the observer is located on a separate vessel, if vessel size and safety are factors for a particular sector of this, or any other, fishery. Additionally, electronic monitoring technology may also be an option for smaller vessels in a gillnet fishery.

*Comment 4:* MD DNR also commented that the vessels that participate in the mid-Atlantic gillnet fishery are already subject to observer coverage, and the addition of this fishery to the AD will result in excessive observer coverage to those vessels. MD DNR requests that the NMFS observer program design standards be factored into the selection process for the AD and requests clarification on the definition of inappropriate, excessive observer coverage.

*Response:* NMFS makes every attempt to avoid overburdening a particular fisherman or fishery. Days are allocated in proportion to fishing effort by time/area, and sampling protocols account for all observer authorities, including MSA, MMPA, and the ESA. All three authorities may be used for a single trip to minimize duplication. Above, we identified the standards NMFS will follow for distributing and placing observers among fisheries identified in the AD and among vessels in those fisheries. These standards include the need to minimize costs and avoid duplication, where practicable. In designing a study, NMFS would identify the pool of vessels that may be observed and consider all the authorities under which these vessels may be observed. This would include coordinating with states, as appropriate, on coverage that may be implemented directly by the state (*i.e.* outside of NMFS authorities).

As stated in the preamble, "Sampling designs for all NMFS observer programs are developed to provide statistically valid information and to produce results that will contribute to the body of best available science. The sampling design will vary depending on many factors, including the fishery to be observed, the spatial and temporal variability in the fishery and species observed, and the overall goals of the observer program. Once a fishery is selected for observer coverage, a sampling design will be developed to yield statistically valid results." [72 FR 43176, August 3, 2007].

*Comment 5:* Garden State Seafood Association stated they do not support including the mid-Atlantic gillnet on the 2018 AD and requests that the Agency analyze the observer information by mesh size, by directed fishery, and perhaps by region to make a determination. The commenter requests that NMFS not treat all gillnet fisheries the same. Additionally, they provided data on observed gillnet trips from New Jersey fishing vessels and stated that not all gillnet fisheries pose the same risk.

*Response:* NMFS acknowledges that not all gillnet fisheries pose the same risk. To determine risk of an interaction with a sea turtle we consider factors such as, mesh size, water temperature, density of habitat use by sea turtles. Murray (2009, 2013) found that loggerhead interaction rates in mid-Atlantic gillnet gear are associated with latitude, sea surface temperature, and mesh size.

NMFS would also like to clarify that the universe of commercial fisheries considered for the AD (50 CFR 222.402) is based on the MMPA LOF. If the LOF defines a fishery based on broad gear type, NMFS must use that broad gear type on the AD. The LOF defines the scope and geographic area of the mid-Atlantic gillnet fishery, and under the AD, we are unable to isolate specific sections of the fishery for inclusion or exclusion. NMFS must annually reexamine the LOF and provide the opportunity for public comment. NMFS will consider any proposals for changes to the LOF submitted during the annual public comment process. However, even without changes to the LOF, NMFS may determine that only portions of a fishery will be observed using AD authority. For example, while NMFS has decided to include the mid-Atlantic gillnet fishery on the 2018 AD, NMFS is most interested in increasing coverage in nearshore coastal waters of the mid-Atlantic and Delaware Bay.

When evaluating a fishery for inclusion on the AD, we look at all observer data available for the fishery. NMFS notes the specific data provided on gillnet observations that have occurred in New Jersey, but as noted above we are unable to isolate one state or section of the mid-Atlantic gillnet fishery for either inclusion or exclusion from the AD. However, NMFS considers this information when determining the sampling protocol.

*Comment 6:* Turtle Island Restoration Network (TIRN) submitted a comment requesting that NMFS maintain adequate coverage for California thresher shark/swordfish drift gillnet fishery, stating that there is little understanding of sea turtle bycatch on trips with no observers and failure to observe an interaction does not mean that interactions are no longer occurring.

*Response:* The California thresher shark/swordfish drift gillnet fishery is currently observed under NMFS' MMPA and MSA authorities. The comment regarding maintaining coverage has been noted.

#### **Comments on Seine/Weir/Pound Net Fisheries**

*Comment 7:* Omega Protein submitted comments to clarify the participation and target species for the menhaden purse seine fishery. The commenter indicated that while the Federal Register notice states that there are 40 to 42 menhaden purse seine vessels operating in the Gulf of Mexico, in fact, the total number of such vessels is only 28 vessels. Information on the Atlantic fishery was also provided but is outside the scope of this action. Additionally, the notice stated that the Gulf menhaden fishery targets thread herring. The commenter indicates that is not correct, and the fishery solely targets menhaden.

*Response:* NMFS thanks you for your comment and for providing this information. The participant number included in the AD is based on the most recent LOF. NMFS will consider

this information in a future LOF.

### **Comments on AD Evaluation Criteria and Data**

*Comment 8:* Garden State Seafood Association commented that while NMFS did not use stranding data for the 2018 AD, NMFS could consider stranding data when developing the AD. If NMFS were to consider strandings, they do not believe this is an appropriate method to use for AD evaluation, unless a stranding is proven to be a result of a fishery interaction.

*Response:* NMFS would like to clarify that we do evaluate stranding data and trends when developing the AD each year, and this was also the case for the 2018 AD. Stranding data are one of many sources of data that are used when a fishery is recommended for inclusion on the AD. It is not the only factor in determining if a fishery should be included on the AD, rather it is considered within the full scope of available data. Stranding data are monitored throughout the year for changes in patterns and trends. While these data were evaluated for the 2018 AD, it was not a factor for listing the mid-Atlantic gillnet or the Gulf of Mexico menhaden purse seine fisheries. As described in the proposed rule, these fisheries met the criteria that the fishery operates in the same waters and times as sea turtles are present, takes have been well documented in this fishery, and NMFS intends to monitor this fishery.

NMFS would also like to clarify how stranding data may be attributed to a particular fishery. Proximity to a particular fishery or fisheries in the area is not the only factor considered, rather it is one of many pieces of information that are used by veterinarians and stranding staff when determining a cause of stranding. Body condition, decomposition, lacerations and/or other marks on the carcass, water temperature, currents, and harmful algal blooms are examples of data that may be considered when determining the cause of a stranding.

## Comments on Observer Coverage and Protocols

*Comment 9:* Garden State Seafood Association requests NMFS clearly articulate how an interaction or event can be classified as a condition of "unknown" in the observer database and how a "decomposed" turtle can be attributed to a particular fishery.

*Response:* This comment is outside the scope of the AD rulemaking. NMFS would like to provide general clarification on the two questions posed by the commenter. Observer protocols provide clear guidance to the observer on how to classify an interaction and what information to record. At times, the observer is unable to determine the condition (*e.g.*, alive, fresh dead, moderately decomposed) of the animal. For example, when observing gillnet fisheries, the observer may be able to see that there is a turtle in the gillnet, but when the gillnet is hauled back the animal falls out of the net before the observer is able to assess the animal. In this instance, the interaction may be recorded as condition unknown. The animal may also not be identified to species.

Decomposition classifications (*e.g.*, fresh dead, moderately decomposed, advanced decomposition) are made by the observer, but the observer would not make a determination on whether a decomposed carcass should be attributed to a particular fishery. Rather, the latter is determined during the post-interaction mortality determination, which considers the type of gear (mobile or fixed). For mobile gears, moderately and severely decomposed animals are not typically attributed to the haul on which they were caught and, thus, are not attributed to that fishery. For fixed gear, NMFS further evaluates the animal and its capture conditions, considering factors such as but not limited to the animal's condition, water temperature, and soak times to determine if the animal's death was related to the fishery interaction.



*Comment 10:* Turtle Island Restoration Network also commented on Exempted Fishing Permits (EFP) that are under review for the West Coast longline fishery and recommends 100% observer coverage for any EFPs issued, as required by the AD.

*Response:* Exempted Fishing Permits are outside the scope of the AD. NMFS would like to clarify that 100% observer coverage is not required by the AD. The AD does not prescribe a specific level of observer coverage for any fishery; rather it identifies fisheries about which NMFS intends to collect additional information. As described above, the sampling design of any observer program for fisheries identified through the AD process is determined on a fishery by fishery basis.

*Comments with Recommendations for Fisheries to Include on the 2018 AD*

*Comment 11:* One commenter proposes including the Hawaii deep-set longline fishery to the AD because the fishery is categorized as a Category I Fishery, longlines are associated with bycatch, and olive ridley sea turtles are present where the fishery operates. The commenter also indicates that a Category I classification under the LOF is justification alone for inclusion on the AD.

*Response:* NMFS acknowledges that there are other fisheries, in addition to those listed on the AD, that may be a concern for sea turtles. The AD is not meant to be a comprehensive list of fisheries that interact with sea turtles or fisheries that require monitoring, but rather a focused list where NMFS can increase or adjust observer coverage with the goal of collecting information on sea turtle interactions with a fishery. As noted previously, NMFS has authority to observe federally-permitted vessels under the MSA and collect sea turtle bycatch information. The Hawaii deep-set longline fishery already carries observers under MSA authority, which is

currently sufficient to collect information on sea turtles.

NMFS would also like to clarify that the AD is not directly related to the LOF classifications, and a specific classification of a fishery on the LOF does not alone justify inclusion on the AD. Please see the response to Comments 3 and 7 for additional detail.

*Comment 12:* Turtle Island Restoration Network requested that the Gulf of Mexico “recreational fishery” including the Gulf of Mexico portion of the Category III Atlantic/Gulf of Mexico/Caribbean charter boat fishery be included in the 2018 AD to more accurately determine the level of interactions with sea turtles and to inform possible management decisions for the conservation of the impacted species.

*Response:* As mentioned above, NMFS used the most recent version of the annually published LOF as the comprehensive list of commercial fisheries for consideration. NMFS considered the Atlantic Ocean, Gulf of Mexico, Caribbean commercial passenger fishing vessel fishery, as specified on the LOF, but determined the fishery does not currently meet the criteria for inclusion on the 2018 AD. NMFS has also considered inclusion of several recreational fisheries, but has not yet included any recreational fisheries on the AD. NMFS has utilized other mechanisms, outside of observer programs to collect data on recreational interactions. .

### **Fisheries Included on the 2018 Annual Determination**

NMFS includes two new fisheries (both in the Atlantic Ocean/Gulf of Mexico) on the 2018 AD. The two fisheries, described below and listed in Table 1, are the mid-Atlantic gillnet fishery and the Gulf of Mexico menhaden purse seine fishery.

NMFS used the 2017 MMPA LOF (82 FR 3655; January 12, 2017) as the comprehensive list of commercial fisheries to evaluate fisheries to include on the AD. The fishery name,

definition, and number of vessels/persons for fisheries listed on the AD are taken from the most recent MMPA LOF. Additionally, the fishery descriptions below include a particular fishery's current classification on the MMPA LOF (*i.e.*, Category I, II, or III); Category I and II fisheries are required to carry observers under the MMPA if requested by NMFS. As noted previously, NMFS also has authority to observe federally permitted vessels under the MSA and collect sea turtle bycatch information.

### *Gillnet Fisheries*

Sea turtles are vulnerable to entanglement and drowning in gillnets. The main risk to sea turtles from capture in gillnet gear is forced submergence (*i.e.*, drowning). Sea turtle entanglement in gillnets can also result in severe constriction wounds and/or abrasions. Large mesh gillnets (*e.g.*, 10-12 inch (in.) (25.4-30.5 centimeter (cm)) stretched mesh or greater) have been documented as particularly effective at capturing sea turtles. However, sea turtles are prone to and have been commonly documented entangled in smaller mesh gillnets as well.

### *Mid-Atlantic Gillnet Fishery*

NMFS includes the mid-Atlantic gillnet fishery on the 2018 AD given known interactions between sea turtles and this gear type and the need to collect more sea turtle bycatch data in state inshore gillnet fisheries. The mid-Atlantic gillnet fishery was not listed in the 2015 AD, but the Chesapeake Bay inshore gillnet fishery and Long Island inshore gillnet fishery were. By including the mid-Atlantic gillnet fishery in the 2018 AD, we authorize observer coverage more completely in the mid-Atlantic region. The mid-Atlantic gillnet fishery (estimated 3,950 vessels/persons) targets monkfish, spiny dogfish, smooth dogfish, bluefish, weakfish, menhaden, spot, croaker, striped bass, large and small coastal sharks, Spanish mackerel, king mackerel,

American shad, black drum, skate spp., yellow perch, white perch, herring, scup, kingfish, spotted seatrout, and butterfish. The fishery uses drift and sink gillnets, including nets set in a sink, stab, set, strike, or drift fashion, with some unanchored drift or sink nets used to target specific species. The dominant material is monofilament twine with stretched mesh sizes from 2.5-12 in. (6.4-30.5 cm), and string lengths from 150-8,400 feet (ft) (46-2,560 meter (m)). This fishery operates year-round west of a line drawn at 72° 30' W. long. south to 36° 33.03' N. lat. and east to the eastern edge of the EEZ and north of the North Carolina/South Carolina border, not including Category II and III inshore gillnet fisheries (*i.e.*, Chesapeake Bay, North Carolina, Long Island Sound inshore gillnet, Delaware River inshore gillnet, Rhode Island, southern Massachusetts (to Monomoy Island), and New York Bight (Raritan and Lower NY Bays) inshore gillnet fisheries). This fishery includes any residual large pelagic driftnet effort in the mid-Atlantic and any shark and dogfish gillnet effort in the mid-Atlantic zone described. The fishing occurs right off the beach (6 ft. (1.8 m)) or in nearshore coastal waters to offshore waters (250 ft. (76 m)).

Gear in this fishery is managed by several Federal FMPs and Interstate FMPs managed by the Atlantic States Marine Fisheries Commission. These fisheries are primarily managed by total allowable catch (TAC); individual trip limits (quotas); effort caps (limited number of days at sea per vessel); time and area closures; and gear restrictions and modifications.

This fishery is classified as Category I on the MMPA LOF, which authorizes NMFS to observe this fishery in state and federal waters for marine mammal interactions and to collect information on sea turtles should a take occur on an observed trip. This fishery was listed on the 2010 AD and was eligible for observer coverage through 2014.

NMFS includes this fishery pursuant to the criteria identified at 50 CFR 222.402(a)(1) for listing a fishery on the AD because sea turtles are known to occur in the same areas where the fishery operates, takes have been well documented in this fishery, and NMFS intends to monitor this fishery, particularly the segment that occurs in the nearshore coastal waters of the mid-Atlantic and Delaware Bay.

#### *Weir/Seine/Floating Trap Fisheries*

Pound net, weir, seine and floating trap fisheries may use mesh similar to that used in gillnets, but the gear is prosecuted differently from traditional gillnets. Purse seines, weirs and floating traps also have the potential to entangle and drown sea turtles.

#### *Gulf of Mexico Menhaden Purse Seine Fishery*

NMFS includes the Gulf of Mexico menhaden purse seine fishery on the 2018 AD. The Gulf of Mexico menhaden purse seine fishery (estimated 40-42 vessels/persons) targets menhaden. The fishery uses purse seine gear and operates in bays, sounds, and nearshore coastal waters along the Gulf of Mexico coast. The majority of fishing effort occurs in Louisiana and Mississippi, with lesser effort in Alabama and Texas state waters. Florida prohibits the use of purse seines in state waters. The fishery is state-managed, with planning efforts coordinated under the Gulf States Marine Fisheries Commission Interstate Gulf Menhaden Fishery Management Plan.

This fishery is classified as Category II on the MMPA LOF, and has never been included on the AD. Sea turtle strandings in the northern Gulf of Mexico have been documented during times and in areas near where the menhaden fishery operates. The fishery was observed in the early-1990s by Louisiana State University. In 2011, NMFS conducted a pilot observer program

in this fishery to better understand the fishery's operations and evaluate the feasibility of observing for marine mammal and sea turtle bycatch. During the pilot observer program, two sea turtles were documented, one dead Kemp's ridley that was excluded by the large fish excluder and one live unidentified turtle that was successfully released from the purse-seine net. Future observer efforts will build on the information obtained in 2011.

NMFS includes this fishery pursuant to the criteria identified at 50 CFR 222.402(a)(1) for listing a fishery on the AD because sea turtles are known to occur in the same areas where the fishery operates, takes have been documented in this fishery, and NMFS intends to monitor this fishery.

**Table 1 – State and Federal Commercial Fisheries included on the 2018 Annual**

**Determination.**

| Fishery                               | Years Eligible to Carry Observers |
|---------------------------------------|-----------------------------------|
| <u>Gillnet Fisheries</u>              |                                   |
| Mid-Atlantic gillnet                  | 2018-2022                         |
| <u>Pound Net/Weir/Seine Fisheries</u> |                                   |
| Gulf of Mexico menhaden purse seine   | 2018-2022                         |

## **Classification**

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration during the proposed rule stage that this action would not have a significant economic impact on a substantial number of small entities. The factual basis for this certification was published in the proposed rule and is not repeated here. No comments were received regarding this certification. As a result, a regulatory flexibility analysis was not required and none was prepared.

The information collection for the AD is approved under Office of Management and Budget (OMB) under OMB control number 0648-0593.

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the Paperwork Reduction Act, unless that collection of information displays a currently valid OMB Control Number.

This final rule has been determined to be not significant for the purposes of Executive Order 12866.

An environmental assessment (EA) was prepared under the National Environmental Policy Act (NEPA) on the issuance of the regulations to implement this observer requirement in 50 CFR part 222, subpart D. The EA concluded that implementing these regulations would not have a significant impact on the human environment. This final rule would not make any significant change in the management of fisheries included on the AD; and, therefore, this final rule would not change the analysis or conclusion of the EA. If NMFS takes a management action



for a specific fishery, for example, requiring fishing gear modifications, NMFS would first prepare any environmental document required under NEPA and specific to that action.

This final rule would not affect species listed as threatened or endangered under the ESA or their associated critical habitat. The impacts of numerous fisheries have been analyzed in various biological opinions, and this final rule would not affect the conclusions of those opinions. The inclusion of fisheries on the AD is not considered a management action that would adversely affect threatened or endangered species. If NMFS takes a management action, for example, requiring modifications to fishing gear and/or practices, NMFS would review the action for potential adverse effects to listed species under the ESA.

This final rule would have no adverse impacts on sea turtles and may have a positive impact on sea turtles by improving knowledge of sea turtles and the fisheries interacting with sea turtles through information collected from observer programs.

This final rule would not affect the land or water uses or natural resources of the coastal zone, as specified under section 307 of the Coastal Zone Management Act.

Dated: May 7, 2018.

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